

Hi Derek,

Per my voice mail, with Ann on leave this week, I am trying to track down some information relating to Administrator signature of a tribal consultation letter for the WOUS 2.0 rulemaking. I'm not sure whether you might have been involved in this; or whether it has been handled through the CMS staff and others in OA.

The letter should have moved from OW to OA for signature late yesterday. I'm trying to find out the status of the letter, if possible. (Our CMS staff is out of the pocket at the moment.) The other question that has come up is that

## **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5** But, again, I'm not sure who might be involved.

If you might have any info on status or who might be shepherding the letter/the internal process for this, this would be very helpful...

If it's helpful -- the control number is OW-17-000-7647.

Thanks, and hope all is well!

Karen Gude  
Tribal Program Coordinator  
U.S. EPA/Office of Water  
Phone: (202) 564-0831

**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]  
**Cc:** Peterson, Carol[Peterson.Carol@epa.gov]  
**From:** CWAwotus  
**Sent:** Thur 4/20/2017 7:00:55 PM  
**Subject:** FW: WOTUS - Jackson County, MS Board of Supervisors  
Jackson county, MS Comments on Proposed Rule on Waters of the U.S. (6828937) (1).pdf

FYI – this request has come in.

**From:** Fehrenbach, John [mailto:JFehrenb@winston.com]  
**Sent:** Thursday, April 20, 2017 2:07 PM  
**To:** Hanson, Andrew <Hanson.Andrew@epa.gov>; CWAwotus <CWAwotus@epa.gov>  
**Subject:** WOTUS - Jackson County, MS Board of Supervisors

Good afternoon:

Our client, the Jackson County (Mississippi) Board of Supervisors, will be in DC next week -- the afternoon of Tuesday, April 25<sup>th</sup> through noon on Thursday, April 27<sup>th</sup> -- and would appreciate an opportunity to meet with you (or other appropriate EPA officials) for a few minutes to discuss the severe impacts that the WOTUS rule – if implemented -- would have on the County. (FYI is a copy of the County's written comments on the proposed rule.)

We realize that EPA has recently held a meeting with state and local officials, but the County was not able to participate in that meeting. and would greatly appreciate the opportunity to meet, during any of the time windows:

- Tuesday the 25<sup>th</sup> – 4:30 or later
- Wednesday the 26<sup>th</sup> – in the morning
- Thursday – in the morning

Your consideration of this request is appreciated.

Best regards,

**John Fehrenbach**  
Winston & Strawn LLP  
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**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Weinstock, Larry[Weinstock.Larry@epa.gov]  
**From:** Brown, Sineta  
**Sent:** Thur 4/20/2017 5:14:54 PM  
**Subject:** FW: CMS New Assignment - Yvonne Smothers - AX-17-000-7640  
[AX-17-000-7640 Kelln.pdf](#)

Mindy,

Please review the attached control I believe this should be reassigned to a Region. Please advise.

Sineta Brown  
Program Analyst  
Office of Wetlands Oceans and Watersheds  
Wetlands Division  
202-564-3666

-----Original Message-----

From: cmsadmin@epa.gov [mailto:cmsadmin@epa.gov]  
Sent: Thursday, April 20, 2017 11:49 AM  
To: Goodin, John <Goodin.John@epa.gov>; Hunter, Christopher <Hunter.Christopher@epa.gov>; Miller, Clay <Miller.Clay@epa.gov>; Brown, Sineta <Brown.Sineta@epa.gov>; Weinstock, Larry <Weinstock.Larry@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>  
Subject: CMS New Assignment - Yvonne Smothers - AX-17-000-7640

Control AX-17-000-7640 has been assigned to your office on 4/20/17 11:49 AM by Yvonne Smothers. Please go to the CMS webpage to view the details of the control.

Summary Information -  
Control Number: AX-17-000-7640  
Control Subject: Swartzentruber Matter, Daviess County, Indiana, ID No. LRL-2014-51-sew  
From: Kelln, H. Max

Note: This Email was automatically generated. Please do not attempt to respond to it. You can access this control at <https://cms.epa.gov/cms>. Questions or comments concerning CMS should be directed to CMS Support at 202-564-4985 or [CMS.Information@epa.gov](mailto:CMS.Information@epa.gov).

**To:** Balasa, Kate[balasa.kate@epa.gov]  
**Cc:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**From:** Downing, Donna  
**Sent:** Thur 4/20/2017 4:16:29 PM  
**Subject:** Additional WOTUS-related materials that may be of interest to the WDDs  
federalism FINAL ppt 4-19-17.pptx  
draft Basic Talking Points.docx

Hi Kate:

Attached are (1) the powerpoint used at yesterday's federalism meeting on the Step 2 WOTUS rulemaking, and (2) talking points that have been approved by senior leadership for discussing the WOTUS activity with outside groups. I thought both might be of interest for the WDDs as additional background material for this afternoon's update briefing. My understanding is that, although the talking points can be used for talking with outside groups, they shouldn't be otherwise shared outside EPA at this time.

Looking forward to our 3:30 (EDT) call!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

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Washington, DC 20004

**To:** Downing, Donna[Downing.Donna@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**From:** Christensen, Damaris  
**Sent:** Thur 4/20/2017 2:50:57 PM  
**Subject:** federalism FINAL ppt 4-19-17.pptx  
[federalism FINAL ppt 4-19-17.pptx](#)

# The Definition of “Waters of the U.S.”

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E.O. 13132 Federalism Consultation Meeting

April 19, 2017

# Purpose & Agenda

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## Purpose:

- Initiate Federalism consultation to obtain state and local government officials' perspectives
- Provide an overview of potential changes under consideration for the definition of "Waters of the U.S."

## Agenda:

- Federalism overview
- "Waters of the U.S." over time
- The Executive Order
- Proposed two-step process
  - Step 1
  - Step 2
- Discussion of Potential Approaches
- Next steps

# E.O. 13132, Federalism

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The Order requires that Federal agencies consult with elected state and local government officials, or their representative national organizations, when developing regulations that have federalism implications.

The agencies are consulting due to strong interest on the part of state and local governments on this issue over the years and potential effects associated with a change in the definition of “waters of the U.S.”

# “Waters of the U.S.” Over Time

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From the 1970s through the 1990s, the majority of federal courts, as well as the agencies, consistently interpreted a broad scope of Clean Water Act jurisdiction.

Supreme Court decisions in 2001 and 2006 held that the scope of navigable waters must be linked more directly to protecting the integrity of waters used in navigation. The justices in the 2006 *Rapanos* decision were split on how this was to be accomplished.

The agencies have been working since these Supreme Court decisions to provide clarification and predictability in the procedures used to identify waters that are – and are not – covered by the Clean Water Act.

The 2015 Clean Water Rule was an effort to provide that needed clarification and predictability. Many stakeholders, including many states, expressed concerns with the 2015 Rule.

The agencies are now embarking on another effort to provide clarity and predictability to members of the public.

# The Executive Order

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On February 28, 2017, the President signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

The E.O. calls on the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule and “publish for notice and comment a proposed rule rescinding or revising the rule....”

The E.O. directs that EPA and the Army “shall consider interpreting the term ‘navigable waters’” in a manner “consistent with Justice Scalia’s opinion” in *Rapanos*. Justice Scalia’s opinion indicates CWA jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

<https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

# Two-Step Process

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The agencies are implementing the Executive Order in two steps to provide as much certainty as possible as quickly as possible to the regulated community and the public during the development of the ultimate replacement rule.

1. The agencies are taking action to establish the legal status quo in the Code of Federal Regulations, by recodifying the regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
2. The agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

The agencies are aware that the scope of CWA jurisdiction is of intense interest to many stakeholders and therefore want to provide time for appropriate consultation and deliberations on the ultimate regulation.

In the meantime, the agencies will continue to implement regulatory definition in place prior to the 2015 rule, consistent with the 2003 and 2008 guidances, in light of the *SWANCC* and *Rapanos* decisions, pursuant to the Sixth Circuit stay of the Clean Water Rule.

# Step 1: Withdraw 2015 Clean Water Rule

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While the Sixth Circuit stay may remain in effect for some time, its duration is uncertain.

To provide greater certainty, the agencies will move to reinstate the preexisting regulations and guidance and to withdraw the 2015 Rule.

In the Step 1 proposed rule, the agencies will define “waters of the United States” using the regulatory definition in place before the Clean Water Rule, which the agencies will continue to implement according to longstanding practice, just as they are today.

The Step 1 proposed rule would maintain the approach in place for decades until a revised rule with a new definition can be promulgated.

# Step 2: Develop New Rule Consistent with the Executive Order

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The E.O. directs the agencies to consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

Justice Scalia’s opinion indicates Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

The agencies are consulting with state and local government officials as we begin to develop the new definition.

# Potential Approaches to “Relatively Permanent” Waters

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Perennial plus  
streams with  
“seasonal” flow

Current practice:  
seasonal flow =  
about 3 months  
(varies  
regionally)

Perennial plus  
streams with another  
measure of flow

Use appropriate,  
implementable  
metrics, e.g.,  
frequency of flow,  
intersecting water  
table

Perennial streams  
only

Streams  
that carry flow  
throughout the  
year except in  
extreme drought

Other

Thoughts?